Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-190

MARY ALICE MARSHALL, WILLIAM HUNT, FANNIE MAE JAMISON, WILLIE MAE ALLEN, ROSA LEE BROWN, JOE E. SCOTT, ANDREW LEE, for themselves and for all others similarly situated,

Petitioners,

v.

WILLIAM F. GAVIN, J. WILLARD SMITH, MARSHALL D. CANNON, as members of the Levy County Jury Commission,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74_____

MARY ALICE MARSHALL, WILLIAM HUNT, FANNIE MAE JAMISON, WILLIE MAE ALLEN, ROSA LEE BROWN, JOE E. SCOTT, ANDREW LEE, for themselves and for all others similarly situated,

Petitioners,

v.

WILLIAM F. GAVIN, J. WILLARD SMITH, MARSHALL D. CANNON, as members of the Levy County Jury Commission,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Mary Alice Marshall, William Hunt, Fannie Mae Jamison, Willie Mae Allen, Rosa Lee Brown, Joe E. Scott, and Andrew Lee, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on May 30, 1974.

Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the judgment of dismissal rendered by the United States District Court for the Northern District of Florida is noted at 495 F.2d 1371 and is set out in the appendix, *infra,* at p. 1a. The opinion of the United States District Court for the Northern District of Florida is reported at 365 F. Supp. 613, and is set out in the appendix, *infra,* at pp. 3a-12a.* A motion for leave to file an out-of-time petition for rehearing was denied by order of July 1, 1974, and is set out in the appendix, *infra,* at p. 2a.

Jurisdiction

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 30, 1974. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

Questions Presented For Review

1. Whether petitioners were entitled to have a three-judge court convened to adjudicate the constitutionality of the mothers' exemption provision of Florida jury law which provides for a sex-based right to opt-out of jury duty in favor of expectant mothers and mothers with children under 18 years of age.

2. Whether the mothers' exemption provision of the Florida jury laws places an unequal burden of jury duty upon men and produces juries in Levy County which do not represent a cross section of the community.

3. Whether Negro citizens have been discriminated against in the selection of persons for jury service in Levy County, Florida.

*The opinions below are rendered *sub nom.* Marshall v. Holmes.

State Statutory Provisions Involved

Florida Statutes, §40.01(1):

> (1) Grand and petit jurors shall be taken from the male and female persons over the age of twenty-one (21) years, who are citizens of this state and who have resided in this state for one (1) year and in their respective counties for six (6) months and who are fully qualified electors of their respective counties; provided, however, that expectant mothers and mothers with children under eighteen (18) years of age, upon their request, shall be exempted from grand and petit jury duty.

Statement of the Case

Petitioners, a group of black men and women citizens, commenced this action on January 13, 1972, alleging that blacks and women were underrepresented on the Levy County, Florida juries, and that Florida Statutes, §40.01(1), which allows expectant mothers and mothers with children under 18 years of age to opt-out of jury service, was unconstitutional. Jurisdiction was based on the Fourteenth Amendment of the Constitution of the United States, 28 U.S.C. §2281, 42 U.S.C. §§1981 and 1983. A three-judge court was requested and the case adjudicated on stipulated facts. The district court entered an opinion order on September 28, 1973, declining to convene a three judge court concluding that the constitutional challenge was insubstantial and resolving all issues in favor of the defendants. The court of appeals affirmed *per curiam* on May 30, 1974, adopting the opinion of the district court.

The current system for jury selection in Levy County was instituted in August, 1970. The respondent jury

commissioners compiled an eligibility file for jury service by mailing a questionnaire to all registered voters. Those voters who were not qualified for statutory exemptions from jury duty as well as those who did not respond to the questionnaire were placed in the eligibility file. A total of 2,978 names were so compiled from which 625 were selected on a random basis to be placed in a box from which jurors' names were drawn. As of August, 1970, voter registration was 4,966 in Levy County, of which 4,415 were white and 551 were black. The racial and sexual composition of the eligibility file at that time was as follows: 1,434 white males, 1,168 white females, 172 black males and 204 black females. Subsequent to the initial composition of the eligibility file, each newly registered voter has received a questionnaire while each elector who has died or moved, if such is made known to the jury commissioners, is eliminated from the eligibility file.

The total number of women claiming the §40.01(1) exemption for mothers and expectant mothers as of April 23, 1973, was 623. Of this number, 195 indicated that they had employment outside the home.

Jury lists for 1971, 1972 and 1973 contained 7.64, 14.39 and 18.0 per cent blacks for an average of 12.97 per cent, and 36.31, 48.29 and 38.0 per cent women for an average of 44.41 per cent respectively.[1] The population of Levy County, Florida is 51 per cent female and 25.2 per cent Negro.

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[1]The parties also stipulated that during 1969 12.81% of jury lists were black and 39.41% were female. For 1970, 14.47% of the lists were black and 25.0% were female. Thus, from 1969 through February 27, 1973, the dates covered by the stipulation, an average of only 40.3% of jury lists were female and 13.2% were black.

Reasons for Granting the Writ

I. The decision below is inconsistent with decisions of this Court requiring close judicial scrutiny of sex-based classifications, and the reliance upon Hoyt v. Florida, 368 U.S. 57 (1961), was misplaced.

The district court, affirmed *per curiam* on appeal, concluded that a three-judge court was not required to hear petitioners' complaint that Florida's exemption from jury duty in favor of pregnant women and mothers with children under 18 years of age was unconstitutional, since the validity of Florida Statutes, §40.01(1) had been settled by *Hoyt v. Florida*, 368 U.S. 57 (1961).[2] Intervening decisions, however, have eroded the ruling in *Hoyt* to the point where it is in plain conflict with vibrant precedent subsequently established by this Court. In *Reed v. Reed*, 404 U.S. 71 (1971), and *Frontiero v. Richardson*, 411 U.S. 677 (1973), this Court signaled a new direction for resolving the constitutionality of sex-based legislation. In *Reed* it invalidated an Idaho statute that gave a preference to men over women for appointment as estate administrators. *Frontiero* struck down a scheme whereby military housing allowance and medical benefits were automatically granted for service wives while such benefits were disallowed for service husbands unless the service member proved she supplied over half her husband's support. The synthesis of *Reed* and *Frontiero* is that similarly situated men and women

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[2] *Hoyt* involved a predecessor statute of §40.01(1) and concluded that it was not unconstitutional to require women to opt-in for jury service by registering with the Clerk of the Circuit Court "her desire to be placed on the jury list." Florida Statutes, 1959, §40.01(1).

are constitutionally entitled to equal treatment by law and that sex-based generalities will not sustain unequal treatment absent the demonstration of a fair and substantial justification for the differential.[3] Classifications such as those contained in the Florida mothers' exemption are now accorded careful review, and stereotypical generalizations, once accepted as a matter of course or given only cursory attention, no longer survive constitutional scrutiny. *Frontiero v. Richardson, supra.* In *Healy v. Edwards,* 363 F. Supp. 1110, 1117 (E.D. La. 1973) (three-judge court), *prob. jur. noted,* 415 U.S. 911 (1974), a decision declaring unconstitutional Louisiana's opt-in plan for jury service for women identical to the one approved in *Hoyt,* the court noted:

> [T]here are occasional situations [such as *Hoyt v. Florida*] in which subsequent Supreme Court opinions have so eroded an older case, without explicitly overruling it, as to warrant a subordinate court in pursuing what it conceives to be a clearly defined new lead from the Supreme Court to a conclusion inconsistent with an older Supreme Court case.[4]

Hoyt is indeed "yesterday's sterile precedent" and it was error for the court below to rely upon it. *Ibid.*

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[3]Kahn v. Shevin, 42 U.S.L.W. 4591, 4593 (April 24, 1974), does not signal a return to the day when this Court countenanced a "sharp line between the sexes," since the classification there involved collection of revenue, an area in which "the states have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Kahn* cannot be read to permit differential treatment of men and women based on traditional notions of separate spheres for the two sexes, for such an interpretation would collide head-on with *Reed* and *Frontiero.*

[4]Quoting from Rowe v. Peyton, 383 F.2d 709, 714 (4th Cir. 1967), *affirmed,* 391 U.S. 54 (1968).

The Florida statutory scheme establishes a sex-based classification that stigmatizes all women, even those who do not wish to serve, by decreeing, in effect that while male participation in the administration of justice is essential, participation by women is not. Identifiable groups in the community may not constitutionally be excluded from jury selection procedures, *Apodaca v. Oregon,* 406 U.S. 404, 413 (1972), and women are such an identifiable group. *White v. Crook,* 251 F. Supp. 401 (M.D. Ala. 1966) (three-judge court); *United States v. Zirpolo,* 450 F.2d 424 (3rd Cir. 1971); *Healy v. Edwards, supra.* Florida's jury selection statutes relegate women "to inferior legal status without regard to [their] actual capabilities." *Frontiero v. Richardson, supra,* 411 U.S. at 687. Women are thus branded as second class citizens in violation of the right of their class to equal treatment.

Section 40.01(1) bears no substantial relationship to any legitimate state objective. The *Hoyt* image of woman "as the center of home and family life," of dubious accuracy for many women in 1961, is today recognized as a gross generalization of the same order as the familiar stereotypes rejected as a basis for legislative classification in *Frontiero* and *Reed.* While the justification for exemption from jury duty in favor of mothers with small children is that they need to be at home caring for their young, the reality of life for women with children in Levy County is that of those exempted from jury service as of 1973 31% had some form of employment outside the home. As well, in 1972, 60% of all married women in the United States living with their husbands were gainfully employed and 42% of all working women were employed full time the year round. U. S. Women's Bureau, Department of Labor, *Highlights of Women's Em-*

ployment and Education (1973). In 1972, 26.9% of the mothers with children under three years old were in the labor force; 36.1% of mothers with children 3-5 years old were gainfully employed; and 50.2% of women with children 6-17 years old were in the labor force. Hayghe, *Labor Force Activity of Married Women,* U.S. Department of Labor, Monthly Labor Review, Table 4, at 34 (April 1973). The fact is that the Florida jury service exemption for women covers a substantial population of mothers for whom child care concerns do not preclude active involvement outside the home. The Florida classification is overinclusive[5] and under *Frontiero* and *Reed* unconstitutional. Plaintiffs' attack upon it was substantial and should have been heard by a three-judge court.

II. This case presents important issues concerning the composition of state court juries and the equal sharing of jury service by all adult members of the community.

Men and women similarly situated who are responsible for the care of children are not treated similarly by Florida jury law. There is no reason for treating them differently. The Florida statute fails to exempt men with child care responsibilities, among them widowed fathers and husbands with incapacitated wives. For these men jury service may be far more burdensome than it is for women. More appropriate means are obviously available to further a genuine concern for care of children.

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[5]It is also underinclusive to the extent that it excludes fathers with children under eighteen. In this respect, it conclusively presumes the mother will be the child tenderer, a decision which family privacy requires be left to the individuals involved, and not steered by the state.

For example, recognizing that child rearing is a function either parent can perform, New Jersey exempts any "person" who has custody of and personal care for a child. N.J.S.A. §93-1304(12). The experience of the federal courts and 30 states that administer jury selection methods which are non-discriminatory on their face, suggest that there is in fact no justification for the statute here.[6]

The disproportionate jury service cast upon men by the mothers' exemption also ensures that juries in Levy County do not reflect a cross section of the community. While 51% of population of Levy County is female, from 1969 to 1973 an average of only 40% of the jury lists were female. Moreover, 623 (31%) of the women eligible for service (assuming they had no other basis for being exempt) used the mothers' exemption to escape jury duty. And 195 of the 623 were employed outside the home. The disparity here is not the product of chance but the direct result of the "benign dispensation" accorded women by Florida law, a dispensation which operates to place a disproportionate burden upon males and ensure non-representative juries. Jury service is

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[6]See Alaska Stat. §§9.20.010; 7 Ariz. Rev. Stat. Ann. §§21.201, 21.202; 3B Ark. Stats. Ann. §§39.101 *et seq.*; 13 Cal. Code Civ. Pro. §§198 *et seq.*; 10 Del. Code Ann. §§4505 *et seq.*; 7 Hawaii Rev. Laws §§609-1 *et seq.*; 2 Idaho Code Ann. §§2-201 *et seq.*; Ill. Ann. Stat. ch. 78 §§1 *et seq.* (Smith-Hurd); Ind. Ann. Stat. §4-7115; Iowa Code Ann. §§607.1 *et seq.*; 3A Kan. Stat. Ann. §§43-155 *et seq.*; 1 Ky. Rev. Stat. §§29.025, 29.035; 14 Me. Rev. Stat. Ann. §§1201 *et seq.*; 5A Md. Ann. Code art. 51, §§1 *et seq.*; Mich. Comp. Laws Ann. §§600.1306, 600.1307; 2 Miss. Code Ann. §§1762 *et seq.*; 7 Mont. Rev. Codes Ann. §§93-1301 *et seq.*; 1 Nev. Rev. Stat. §§6.010 *et seq.*; 2A N.J. Rev. Stat. §§69:1, 69-2; 4 N.M. Stat. Ann. §§19-1-1 *et seq.*; 1B N.C. Gen. Stat. §§9-3 *et seq.*; 5 N.D. Cent. Code §§27-09.1 *et seq.*; 1 Ore. Rev. Stat. §§10.010 *et seq.*; 17 Pa. Stat. §1279; 7 S.D. Code §§16-13-10 *et seq.*; Vt. Stat. Ann. tit. 12, App. VII, Pt. 1, R.25 §27; 2 Va. Code Ann. §§8-208.2 *et seq.*; W. Va. Code Ann. §§52-1-1 *et seq.*; Wis. Stat. Ann. §§255.01, 270.16.

not simply a right, but it is a duty, a "crucial citizen responsibilit[y]" which should be shared by all men and women. *Broadway v. Culpepper,* 439 F.2d 1253, 1258 (5th Cir. 1971).

Whether Florida's mothers' exemption accomplishes discriminatory treatment by virtue of its facial operation or its discriminatory impact, it should be closely scrutinized by this Court. The propriety of close scrutiny flows not only from the fact that the statute embodies a sex-based classification, but from the fact that it abridges the fundamental rights of all citizens to equally shared jury service and trial by representative juries. "[E]xclusion of a discernible class from jury service . . . destroys the possibility that the jury will reflect a representative cross-section of the community." *Peters v. Kiff,* 407 U.S. 493, 500 (1972).

III. Jury selection in Levy County discriminates against Negroes.

In Levy County the population is 25% black. The list of persons from which venires are chosen has varied between 7% and 18% black from 1969 to 1973, for an average of 13.2%. Negro citizens thus have been underrepresented by approximately 50%. This disparity is more dramatic statistically than the showing in *Turner v. Fouche,* 396 U.S. 346 (1970), and it was sufficient to establish a *prima facie* showing of systematic exclusion. *See Alexander v. Louisiana,* 405 U.S. 625 (1971); and *Carter v. Jury Commission of Greene County,* 396 U.S. 320 (1970).

While petitioners in the district court attacked the use of voter rolls in Florida as the sole source for the

names of jurors, a constitutional jury list may be compiled in Levy County without disturbing the source of names of jurors.[7] Overrepresentation of whites and underrepresentation of blacks could be corrected by drawing Negro citizens at a higher rate than whites for jury service. *See Brooks v. Beto,* 366 F.2d 1 (5th Cir. 1966). And while Florida statutes do not permit other sources to supplement the voter rolls, where the federal Constitution commands that juries be representative, no impediment or barrier to supplementing the list of voter rolls should exist. Nothing contained in *Carter* or any of the cases relied upon below requires this Court to condone continued and exclusive use of underrepresentative voter rolls which yield underrepresentative juries. The constitutional end sought is not use of any particular lists, but juries which represent a cross-section of the community. *Broadway v. Culpepper,* 439 F.2d 1253, 1257 (5th Cir. 1971).

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[7]This Court has approved the use of voter lists as the source of names for jurors, but the use of voter lists which are themselves the product of discrimination should not be countenanced. United States ex rel. Goldsby v. Harpole, 263 F.2d 71, 78 (5th Cir. 1959). *Cf.* Whitus v. Georgia, 385 U.S. 545 (1967).

Conclusion

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 73-3849
Summary Calendar*

MARY ALICE MARSHALL, ET AL.,
For themselves and for all
others similarly situated,

Plaintiffs-Appellants,

VERSUS

DONALD HOLMES, ET AL., Etc.,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Florida

(May 30, 1974)

Before COLEMAN, DYER and RONEY,
Circuit Judges.

PER CURIAM:

We affirm the judgment of the district court for the reasons set forth in its adjudication 365 F. Supp. 613. See Local Rule 21.[1]

*Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

[1]See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

Filed July 1, 1974.

In the United States Court of Appeals
For the Fifth Circuit

No. S73-3849

Mary Alice Marshall, et al., for themselves
and for all others similarly situated,

Plaintiffs-Appellants,

versus

Donald Holmes, et al., Etc.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Florida

Before COLEMAN, DYER and RONEY,
Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellants' motion for leave to file a Petition for Rehearing out of time is denied.

Filed Sept. 28, 1973
In the United States District Court
For the Northern District of Florida
Gainesville Division

Mary Alice Marshall, et al., Plaintiffs,

v.

Donald Holmes, et al., Defendants.
Gainesville Civil Action No. 508

OPINION-ORDER

STATEMENT OF THE ACTION

Plaintiffs in this class action attack the validity of *Florida Statutes,* Section 40.01 relating to qualifications and disqualifications of jurors. This statute[1] is alleged to offend the United States Constitution both on its face and as applied. Plaintiffs are black and female citizens who are making a three-pronged attack on the method of selecting jurors in Levy County, Florida. They allege that (1) the statute is unconstitutional in that it limits

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[1]The portion of the statute assailed provides:

"(1) Grand and petit jurors shall be taken from the male and female persons over the age of twenty-one (21) years, who are citizens of this state and who have resided in this state for one (1) year and in their respective counties for six (6) months and who are *fully qualified electors* of their respective counties; provided, however, that expectant mothers and mothers with children under eighteen (18) years of age, upon their request, shall be exempted from grand and petit jury duty . . ." (Emphasis supplied)
This statute has been recently amended to lower the minimum age of qualification of prospective jurors to 18 years of age and this is not at issue in this cause.

potential jurors to those registered to vote, (2) that blacks and women are underrepresented on jury lists, and (3) that women are discriminated against since women who have children under eighteen (18) years of age may be exempt from jury service upon request. There are also claims under certain provisions of the Florida Constitution considered by this Court not worthy of comment.

Jurisdiction is founded also on the provisions of Title 42, *United States Code*, Section 1981 and 1983 and Title 28, *United States Code*, Section 2281.

APPLICATION FOR THREE JUDGE COURT

Initially, this Court was confronted with the threshold issue of determining the propriety of three-judge court relief as demanded by plaintiffs and as contemplated by Title 28, USCA, Sections 2281 and 2284. Specifically, this Court had to decide whether the constitutional issue presented in the amended complaint was "substantial" thus requiring the empanelling of a statutory three-judge tribunal. *Mayhue's Super Liquor Store, Inc. v. Meiklejohn*, 426 F.2d 142, 144 (5th Cir. 1970).

If the constitutional issue is clearly lacking in merit or judicially emasculated by prior Supreme Court pronouncements foreclosing the matter as a subject of controversy on constitutional grounds, then the existence of a substantial federal question is deemed wanting. *Ex parte Poresky*, 290 U.S. 30 (1934). Logically then where the challenged statutory enactment withstands the constitutional attack and is assailed in its mere application by state authorities which action allegedly yields an unconstitutional result, the prerequisites for

convening a three-judge court have not been fulfilled. *Ex parte Branford,* 310 U.S. 354, 361 (1939).

In the instant case plaintiffs question the statutory standard limiting those people eligible to serve on Florida juries to those who are "fully qualified electors." Additionally, plaintiffs contest the statutory provision allowing women who have children under eighteen (18) years of age to be exempt from jury service upon request. As a result, therefore, of the application of the Florida statute plaintiffs contend that unconstitutional discrimination against blacks and women obtain.

In *Carter v. Jury Commission of Greene County,* 396 U.S. 320 (1970), the Supreme Court of the United States upheld the decision of a statutory three-judge court, finding that an Alabama statute, similar to the Florida statute challenged herein, was not "irredeemably invalid on its face." *Ibid.,* at 332. In assessing the merits of appellants' argument the Supreme Court noted approvingly of other state laws using the same or similar language to that contained in the Alabama statute. The Court then concluded that although the Alabama statute had been applied in such manner that blacks had been discriminated against, the statutory language standing alone passed constitutional muster and should not be stricken down. Compare *Franklin v. South Carolina,* 218 U.S. 161 (1910).

Thus, it affirmatively appeared to this Court that the constitutional question sought to be raised for determination by a three-judge court was insubstantial and had been foreclosed by previous decisions of the Supreme Court. *Ex Parte Poresky,* supra. The application for convening a three-judge court pursuant to Title 28,

USCA, Section 2284 was denied in a written order of this Court dated August 22, 1972.

It is, however, the view of this Court that the amended complaint does contain allegations of deprivation sufficient to state a claim for declaratory and injunctive relief. Accordingly, the Court makes the following findings of fact and conclusions of law as may be required by Rule 52, *Federal Rules of Civil Procedure*.

FINDINGS OF FACT

1. Plaintiffs are male and female black citizens of Levy County, Florida. They are over the age of eighteen (18) years, have resided in Florida for one year and in the County for six months, and are fully qualified electors for Levy County, Florida.

2. The current system of selecting jurors in Levy County, instituted in August 1970, operates as follows:

(a) Questionnaires are mailed to all registered electors in Levy County.

(b) From the questionnaire responses an "eligibility" list is developed; those individual electors not qualifying for exemptions from jury duty and those persons who failed to return the questionnaire forms are placed on the eligibility list.

3. In August 1970, there were 4,966 registered electors in Levy County, Florida, of which 4,415 were white and 551 were black persons.

4. From the total of 4,966 registered electors, 2,978 names were placed in the eligibility file. Of this number 376 were black persons and 2,602 were white persons. Of the 376 black persons, 172 were male and 204 female

and of the 2,602 white persons, 1,434 were male and 1,168 were female.

5. From the total of 2,978 names in the eligibility file, 625 names were selected on a random basis and were placed in the juror wheel.

6. Since the initial composition of the eligibility list, all newly registered electors are sent the questionnaire form referred to above and depending upon the availability to them of certain of the statutory exemptions, their names are placed on the eligibility list.

7. During the years 1969-1972, black persons in Levy County have consistently constituted approximately 11.30% of the duly registered electors for that county. The same statistics compiled by the Secretary of State and furnished to the Court by the plaintiffs (see the Court's Exhibit I attached herein), reflect that during the years 1969-1973, black persons constituted 12.81, 14.47, 7.64, 14.39 and 18.0% of those on jury lists.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the subject matter of and the parties to this action.

2. Plaintiffs contend herein that *Florida Statutes*, Section 40.01, upon which the Levy County, Florida juror selection plan is predicated, is unconstitutional (1) in that it limits potential jurors to those registered to vote; (2) that blacks and women are underrepresented on jury lists and (3) that women who have children under eighteen (18) years of age are discriminated against since they may be exempt from service upon request.

3. In regard to plaintiffs' claim that use of a "registered elector" list to select jurors is an unconstitutional limitation upon the right of every individual to serve as a juror, this Court feels that the argument is badly eroded, if not absolutely foreclosed, by the Supreme Court pronouncements in *Brown v. Allen,* 344 U.S. 443 at 474 (1952) and *Carter v. Jury Commission of Greene County,* 396 U.S. 320 at 332 (1970).

Although the instant case is an attack by plaintiffs seeking affirmative relief from alleged discriminatory juror selection, *Brown v. Allen,* supra, is helpful even though that case involved defendants challenging judgments of criminal convictions on the ground of systematic exclusion of Negroes from grand juries. In both cases the parties have a "cognizable legal interest in nondiscriminatory jury selection." *Carter,* supra, at 329.

Commenting on a system in *Brown* where property and poll tax lists were used, Justice Reed noted that,

> "Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross section of the population suitable in character and intelligence for that civic duty." *Brown,* supra, at 474.

Justice Stewart in the opinion of the Court in *Carter v. Jury Commission of Greene County,* supra, adopted the language of Justice Reed in validating the multi-list system in Greene County, Alabama.

It is, therefore, apparent to this Court that to the extent plaintiffs contest the *use* of a "registered electors"

list, their argument is without merit. Clearly, this list if it reasonably reflects a cross section of the Levy County population is permissible.

4. Plaintiffs' second contention is that blacks and women are underrepresented on Levy County juror lists. The Court understands this argument to be that whatever the listing system used in Levy County, it does not reasonably reflect a cross section of the population of Levy County. The plaintiffs are not contending that they are entitled to a proportional representation by race or by sex on any particular grand or petit jury since this has been foreclosed on numerous occasions by the Supreme Court and more recently rejected again in *Carter,* supra.

In order to prevail it is incumbent upon plaintiffs to show by substantial evidence that the Florida statute, under which the Levy County plan was developed, operates to unfairly and unreasonably represent blacks and women on juror lists. *Hoyt v. Florida,* 368 U.S. 57, 69 (1961); *Hernandez v. State of Texas,* 347 U.S. 479 (1954); *United States v. Pentado,* 463 F.2d 355 (5th Cir. 1972).

An examination of the record reveals no evidence of such underrepresentation of either blacks or women. To the contrary the evidence would suggest that the black persons in Levy County in 1969, who represented 11.51% of the registered electors of Levy County, constituted 12.81% of individuals on juror lists. In 1971, 11.08% of the registered electors were black yet 14.39% of the individuals on juror lists were black. Figures for the first two months of 1973, reflect that blacks constitute 18% of juror list names.

To the suggestion that the comparison should be made between the percentage of blacks in the Levy County population and the percentage reflected on the juror lists, the Court can only take some direction from the statistics and findings in *Carter v. Jury Commission of Greene County,* supra. Plaintiffs would show that although approximately 25% of the population in Levy County is black, they constitute only about 15% of juror lists. However, the plight of appellants in *Carter,* supra, was that while 75% of the Greene County population was black, the largest number of blacks ever to appear on the jury list between 1961 and 1963 was 7% of the total. In 1966 only 4% of the blacks in Greene County found their way to the jury roll. Yet neither the District Court nor the Supreme Court enjoined the enforcement of the challenged statute.

It, therefore, is the view of this Court as to plaintiffs' second contention that plaintiffs have not carried the legal burden of showing the discrimination which is alleged. Clearly, there has been no showing that the statute is incapable of being carried out with no discrimination as is required by *Carter v. Jury Commission of Greene County,* supra. Accordingly, this Court finds that the elector listing system which is the basis for the Levy County juror lists and which is provided for in the *Florida Statutes,* Section 40.01, reasonably and sufficiently reflects a cross section of the population of Levy County, Florida.

5. As to plaintiffs' contention that the statute is unconstitutional because it allows women with children under eighteen (18) years of age to be exempt from jury duty upon their request, this Court finds the argument to be devoid of merit.

The right of women to serve on juries without discrimination is not an issue before this Court. The Court is doubtful that such an issue would ever again be seriously raised in this day and time; certainly, the case law explicitly recognizing the right of women to serve as jurors is too numerous to mention. Even evidence in the record of this case to which plaintiffs stipulate as true, reflects for instance in the year 1972, that 48.29% of those individuals on juror lists in Levy County were women.

But the plaintiffs' specific complaint is that the exemption in *Florida Statutes*, Section 40.01(1) which is *available upon request* is unconstitutional. This Court cannot countenance such an argument. The "restraint" which plaintiffs seem to suggest simply does not exist; the statute just does not operate to prohibit any woman who is a registered elector from serving on a jury in Levy County. Rather, the normal operation of the statute would place on women desiring the exemption, an affirmative duty of requesting it. If in practice it is somehow discriminatory toward women, at least plaintiffs have failed to carry the burden of showing such discrimination. *Hoyt v. Florida*, supra.[1]

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[1]See *Hoyt v. Florida*, supra. In 1961 the Supreme Court construed *Florida Statutes* 40.01(1). The Court upheld its validity even absent the provisions giving women the affirmative duty of claiming the exemption which appears in its present amended form. The Court noted that:

> "The disproportion of women to men on the list independently carries no constitutional significance. In the administration of the jury laws proportional class representation is not a constitutionally required factor." *Hoyt*, supra, at 69.

While it is alleged that, though not explicitly overruled, *Hoyt* has been "eroded," see *Healy v. Edwards*, ____ F. Supp. ____, E.D. Louisiana 1973 (Slip No. _____, August 31, 1973), 42 LW 1041,

In sum, the Court finds that *Florida Statutes*, Section 40.01 is neither unconstitutional on its face nor as it is applied in Levy County, Florida, and as this Court has heretofore ruled, the issues raised in plaintiffs' behalf have been foreclosed by previous decisions of the Supreme Court and thus a substantial federal question is clearly wanting for purposes of convening a Three-Judge Court. *Ex parte Poresky*, supra. It is, therefore,

ORDERED that judgment in this matter shall be entered disposing of the issues raised in the pleadings in favor of the defendants.

DONE and ORDERED in Tallahassee, Florida, this 28th day of September, 1973.

s/ DAVID L. MIDDLEBROOKS

DAVID L. MIDDLEBROOKS

United States District Judge

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by *Reed v. Reed*, 404 U.S. 71 (1971), the Court notes that *Reed* involved a "statutory scheme which draws a sharp line between the sexes *solely* for the purpose of achieving administrative convenience." *Reed*, supra, at 77. The present amended form of Florida Statutes 40.01(1) which is contested in the matter before this Court involves no such statutory scheme solely for administrative convenience. More importantly, however, the proposition in *Hoyt* that plaintiffs must show the alleged discrimination by substantial evidence, upon which this Court has relied, is unscarred.

Filed Sept. 28, 1973.

United States District Court
For the Northern District of Florida
Gainesville Division

Civil Action File No. GCA 508

Mary Alice Marshall, et al.

vs.

Donald Holmes, et al.

JUDGMENT

This action came on for hearing before the Court, Honorable David L. Middlebrooks, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged

That the plaintiff take nothing, that the action be dismissed on the merits, and that the defendants, Donald Holmes et al, recover of the plaintiffs, Mary Alice Marshall et al, their costs of action.

Dated at Tallahassee, Florida, this 28th day of September, 1973.

MARVIN S. WAITS
Clerk of Court

F. F. TAYLOR
Deputy Clerk

Filed April 20, 1973.

In the United States District Court
For the Northern District of Florida
Gainesville Division

Mary Alice Marshall, et al., Plaintiffs,

versus

Donald Holmes, et al., Defendants.

Civil Action No. 508

STIPULATED FACTS

The parties agree that the following facts are true and correct to the best of their knowledge and stipulate that they shall with this Court's consent be the operative facts for this litigation.

1. The current system of picking names for the jury list was instituted in Levy County in August, 1970.

2. A questionnaire was mailed to each registered elector. Exhibit A to Motion for a Three Judge Court. An eligibility file was developed by eliminating those persons who in the judgment of the Defendants qualified for statutory exemptions from jury duty. Those who did not qualify for exemptions and those persons who did not return their questionnaires were placed into an eligibility file.

3. The total voter registration as of August 1970 was 4,966 of which 4,415 were white and 551 were black. (A male-female breakdown of this figure was requested

from the Supervisor of Elections but this information was not kept by that office and is not available.)

4. The names of 376 black persons were placed in the eligibility file of which 172 were male and 204 female. There were 2,602 white persons' names placed in the eligibility file, 1,434 being male and 1,168 being female.

5. From the total of 2,978 names, 625 names were selected on a random basis from the eligibility file to be placed in the box from which jurors' names are drawn.

6. The figures in Exhibit I reflect the best and most complete knowledge of the parties.

7. Subsequent to the initial composition of the list, each newly registered elector has received a questionnaire. Each elector who has died or moved that is made known to the Defendants is eliminated from the file.

8. The cards which are placed in the file of those who are eligible voters contain the following information: the name, address, date, race, sex, and an indication of which year(s) the person served as a juror.

9. According to the 1970 Census 25.2% of the population of Levy County was "Negro and other races." The Census indicated that only 11 of these persons were not Negroes.

s/ KENT SPRIGGS,
for the Plaintiffs

s/ ARTHUR C. CANADAY,
for the Defendants

EXHIBIT I

	ELECTORS						JURY LISTS						ELIGIBILITY FILE					
YEAR	Wh	Bla	%B	M	F	%F	Wh	Bla	%B	M	F	%F	Wh	Bla	%B	M	F	%F
1969**	4643	604	11.51				177	26	12.81	123	80	39.41						
1970							130	22	14.47	114	38	25.0						
Aug. 1970	4415	551	11.1										2602	376	12.62	1606	1372	46.07
1971**	4506	573	11.08				145	12	7.64	100	57	36.31						
1972	5740	745	11.49				351	59	14.39	212	198	48.29						
1973*							41	9	18.0	31	19	38.0						

*Figures for 1973 available only thru February 27.
Statistics listed in row "August 1970" derived from Affidavit of W. F. Gavin, Chairman of the Levy County Jury Commission; statistics under section headed "Jury Lists" derived from Levy County Venire sheets; statistics listed under "Electors" for 1972 provided by Secretary of State; percentages calculated by Plaintiffs' counsel.

**Statistics listed under "Electors" for 1969 and 1971 provided by Secretary of State.

Filed May 11, 1973.

In the United States District Court
For the Northern District of Florida
Gainesville Division

Mary Alice Marshall, et al., Plaintiffs,

versus

Donald Holmes, et al., Defendants.

Civil Action No. 508

SUPPLEMENTAL STIPULATION

1. The total number of women claiming the Section 40.01 (1) exception for mothers and expectant mothers in Question 17 is 623 as of April 23, 1973.

2. On that same date, the number of those 623 who indicated in their answer to Question 4 that they had outside employment was 195.

3. The year of birth of the youngest child indicated in the answer to Question 17 was as follows:

1952	0
1953	6
1954	18
1955	23
1956	29
1957	19
1958	25
1959	28

1960	33
1961	29
1962	27
1963	28
1964	32
1965	47
1966	35
1967	38
1968	48
1969	49
1970	48
1971	31
1972	11
1973	1
expectant mothers	12

s/ KENT SPRIGGS,
for the Plaintiffs,

for the Defendants.

4/24/73

The above figures were compiled by Plaintiffs. While Defendants have no personal knowledge of them, they are willing to assume their accuracy for purposes of this case.

s/ ARTHUR C. CANADAY,
for the Defendants

5/9/73